

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5603

141

HUGENIA S. DOGGETT, APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

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Court of Appeals of the District of Columbia

No. 5603.

HUGENIA S. DOGETT, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1

Docket No. 46036.

HUGENIA S. DOGETT

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: Maurice Cohn, Esq., E. B. Felsenthal, Esq.

For Commissioner: C. H. Curl, Esq.

Docket Entries.

1929.

Oct. 14. Petition received and filed. Taxpayer notified.
(Fee paid.)

“ 15. Copy of petition served on General Counsel.

Nov. 27. Answer filed by G. C.

“ 29. Copy of answer served on taxpayer—general calendar.

1930.

Mar. 29. Notice of hearing May 8, 1930, Los Angeles, California.

Apr. 29. Motion to postpone hearing to May 12, 1930, filed by taxpayer. 4-28-30 Granted.

May 13. Hearing had before S. J. McMahon—called on merits. Briefs due 8-11-30.

July 15. Transcript of hearing May 13, 1930 filed.

“ 30. Brief filed by taxpayer.

1930.

Aug. 11. Motion for extension of time to Aug. 18, 1930 to file brief filed by G. C. 8-11-30 Granted, to 8-18-30.

“ 13. Brief filed by G. C.

1931.

June 17. Findings of fact and opinion rendered, Mr. McMahon, Div. 16. Judgment will be entered for the Commissioner.

“ 19. Decision entered, Division 16.

Dec. 11. Stipulation of venue filed.

“ 11. Petition for review by D. C. Ct. of Ap. with assignments of error filed by taxpayer.

“ 11. Proof of service filed.

“ 11. Præcipe filed—proof of service thereon.

1932.

Jan. 19. Agreed statement of evidence lodged.

“ 20. Agreed statement of evidence approved and ordered filed.

2

Filed Oct. 14, 1929.

United States Board of Tax Appeals.

Docket No. 46036.

HUGENIA S. DOGGETT, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

Your petitioner, Hugenia S. Doggett, respectfully represents that before March 15, 1927, she duly filed her individual income tax return for the year 1926 in the office of the Collector of Internal Revenue at Los Angeles, California, and paid to the Collector of Internal Revenue the amount of income tax shown thereon to be due; that thereafter said income tax return was audited by the Internal Revenue Agent in Charge at Los Angeles; that on August 30, 1928, said Internal Revenue Agent addressed to your petitioner a report finding an additional tax due from petitioner in the sum of \$2,049.15; that on September 10, 1928

your petitioner filed with the Internal Revenue Agent in Charge at Los Angeles a protest against said finding; that subsequent to the filing of said protest conferences were had with your petitioner at San Diego, and with her attorneys, Felsenthal Struckmann & Miller, at Chicago, Illinois; that under date of March 28, 1929, your petitioner received a letter from the Commissioner of Internal Revenue, Washington, D. C., advising your petitioner

3 that the Internal Revenue Agent in Charge, San Francisco, California, had submitted his report finding a deficiency of \$1,597.88 for the year 1926; that the said finding was approved by the Commissioner; that your petitioner requested a hearing at Washington relative to said report, which hearing was duly had on June 14, 1929, and at which hearing petitioner was represented by her attorney, Maurice Cohn; that thereafter, on, to-wit, September 7, 1929, the Commissioner addressed to your petitioner his letter confirming the finding of a deficiency of \$1,597.88 as aforesaid, and advising your petitioner of her right to appeal to the Board of Tax Appeals within sixty days from September 7, 1929; that your petitioner files this Petition pursuant to said letter of September 7, 1929.

The amount of the deficiency is \$1,597.88, resulting from a disallowance of a deduction of \$8,943.83 for business expenses, sustained in petitioner's business during the year 1926, the entire amount of which is here in controversy.

Your petitioner respectfully assigns errors as follows, to wit:

1. The Commissioner erred in his finding that your petitioner is not engaged in a "business" within the
4 meaning of the provisions of the Revenue Act of 1926 and prior acts which allow as proper deductions all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.

2. The Commissioner erred in disallowing the deduction of \$8,943.83 claimed by your petitioner as business expenses paid and incurred for the year 1926.

3. The Commissioner erred in his finding that the provisions of the Revenue Act authorizing deduction of business expenses were "obviously intended to authorize the reduction of gross income by the cost of producing such income."

4. The Commissioner erred in his finding that the petitioner was not engaged in business for the purpose of livelihood or profit.

Statement of Facts.

Your petitioner respectfully represents that she resides at 3733 Indiana Street, San Diego, California; that she has filed income tax returns in California since the year 1923; that she is a widow, aged Sixty years; that she is possessed of considerable means, consisting of mortgages and bonds, all kept in Chicago, Illinois, and being under the custody and control of Eli B. Felsenthal, 69 W. Washington

5 Street, Chicago, Illinois; that all books and records relating to said securities are kept by Eli B. Felsenthal at Chicago, Illinois, and annual statements forwarded to your petitioner at San Diego for the purpose of enabling her to properly prepare her income tax returns; that practically none of your petitioner's time is devoted to the management, collection of income, investment or reinvestment of her securities or the income therefrom.

Your petitioner further represents that for more than twelve years last past she has devoted all of her time and energy in the publication, sale and distribution of religious books and pamphlets under the name "Joanna Southcott Publications"; that for many years this work was carried on in connection with Carpenter's Book Store at San Diego; that petitioner's principal place of business is now 3733 Indiana Street, San Diego, California, which is also the residence of petitioner; that in the conduct of said business your petitioner has for many years expended large sums of money for printing, binding, publishing, advertising, etc., and for traveling expenses (almost exclusively by automobile) in visiting every part of the United States for the purpose of increasing the sales of her publications, and the income therefrom.

Your petitioner further represents that she has published, and now has stored, thousands of volumes of her publications; that said publications are sold at fixed
6 prices, the price of each publication being generally printed thereon, and also being indicated in advertising leaflets which have been distributed throughout the country by hundreds of thousands. A partial list of books

printed and sold by your petitioner is hereto attached, marked "Exhibit A," and made a part of this petition.

Your petitioner further represents that said publications are largely reprints of the books and teachings of Joanna Southcott, who was an English prophetess who lived in England in the latter part of the eighteenth century; that your petitioner believes that said Joanna Southcott left a box of sealed instruments which was to be opened in England upon the fulfillment of certain conditions; that your petitioner believes that the time for opening this box is close at hand, and that upon the opening of this box there will be an immediate demand on the part of hundreds of thousands of persons to read the books and prophecies of Joanna Southcott, which petitioner has been engaged in printing, publishing and distributing, and that your petitioner will then realize large profits from the sale of her publications and her income will be tremendously increased.

Your petitioner respectfully represents that she has employed one Percy G. Smith to assist her in her work; that said Smith receives a salary for his work, and also receives his board and lodging from your petitioner both in San Diego, and while away from San Diego, traveling over the United States by automobile and by rail.

7 Your petitioner further represents that she has neglected to keep regular books showing all of her receipts and disbursements from her publication business; that she is unable to substantiate all of her disbursements by proper records; that the deductions claimed by her for business expenses were estimated, and that your petitioner believes her estimates to be correct. Your petitioner respectfully shows that the deduction claimed for 1926 on account of business expenses was \$8,943.83, of which \$5,000 was for salaries, \$3650.00 for automobile hire and traveling expenses, and \$293.83 for printing bills. Your petitioner represents that automobile hire and traveling expenses were paid for in cash, and that no record was kept of such expenditures; that your petitioner therefore estimated the said expenditures at Ten Dollars per day for the entire year, thus arriving at the figure of \$3,650.00, which your petitioner believes entirely fair. Your petitioner further shows that the salary item of \$5,000 includes cash salaries paid, as well as an estimate of the cost of board and lodging for P. G. Smith, her assistant,

and traveling expenses while away from home in the pursuit of her business; that said figure also includes a reasonable allowance for the services of your petitioner in and about said business.

Your petitioner respectfully shows that said publication business occupies her entire time; that your petitioner conducts a large amount of correspondence relating
8 to the distribution of her publications, and that her business annually involves transactions running into the thousands, all in connection with the printing, sale and distribution of said publications and other matters necessarily involved in the conduct of said business; that your petitioner has no other trade, profession or business which engages her attention; that all of her time, energies and a considerable portion of her income from her securities and the sale of her publications are devoted to said business; that one of the primary purposes of your petitioner in engaging in said business is for the profit which she hopes will be ultimately derived therefrom.

Prayer.

Wherefore, your petitioner prays that she may be held to be engaged in a "business" within the meaning of the various income tax laws of the United States, and that she shall be allowed the sum of \$8,943.83, or such other sum as the Board deems proper, as a deduction for business expenses incurred during the year 1926.

HUGENIA S. DOGGETT,
Petitioner.

MAURICE COHN,
Attorney for Petitioner.

Petitioner's address: 3733 Indiana Street, San Diego, Calif.

Attorney's address: 69 W. Washington St., Chicago, Illinois.

9 STATE OF CALIFORNIA,
County of San Diego, ss:

Hugenia S. Doggett, being first duly sworn, on oath deposes and says that she is the petitioner in the foregoing Petition by her subscribed; that she has read the contents thereof, and that the same is true in substance and in fact;

that said Petition is not interposed for delay, and that your petitioner believes that there is adequate grounds for the filing of said Petition.

HUGENIA S. DOGGETT.

Subscribed and sworn to before me this 10th day of October, A. D. 1929.

EDGAR O. HODGE,
Notary Public, California.

10 "EXHIBIT A."

List of Publications.	Number printed.	Price.
.....		
.....		
.....		

11 "EXHIBIT A" (continued).

List of Publications.	Number printed.	Price.
.....		
.....		
.....		

12 "EXHIBIT A."

List of Publications.	Number printed.	Price.
Sound an Alarm in My Holy Mountain...	25,000	50c
Caution & Instruction to the Sealed		
A Communication to Rev. Mr. Pomeroy..	2,000	35c
A Word to the Wise or A Call to the		
Nation	10,000	35c
The Full Assurance of the Kingdom of		
Christ	5,000	35c
Divine & Spiritual Communications on the		
Prayers and Mystery of the Trinity....	5,000	35c
The Kingdom of Christ is at Hand.....	5,000	50c
A Warning to the World	3,000	50c
Prophecy & Visions	2,000	1.00
Prophecy and A Word in Season to a		
Sinking Kingdom	2,000	1.00
Strange Effects of Faith 2 vol.....	3,000	1.00
True Explanation of the Bible 3 vol.....	2,000	1.00

List of Publications.	Number printed.	Price.
What Manner of Communications are These		
The Answer of the Rev. T. P. Foley to the World	5,000	1.25
The Controversy of the Spirit with the Worldy Wise		
The Continuation of the Controversy Letters sent to the Clergy of Exeter		
A Communication sent to Rev. Pomeroy..	5,000	1.25
A Communication in Answer to Mr. Brothers Book		
Remarks & Inquiries on Rev. Cockins Sermon		
An Answer to a Sermon published by Mr. Smith		
An Answer to Thos. Paine's Third Part to the Age of Reason also to S. Lane and Hewson Clarke	12,000	1.25
The Explanation of the Parables pub. in 1804		
An Account of the Trials on Bills of Ex- change		
Wisdom excelleth the Weapons of War...	5,000	1.25
Prophecies Announcing the Birth of the Prince of Peace		
A Dispute between the Woman & the Pow- ers of Darkness		
The Answer of the Lord to the Powers of Darkness	5,000	1.50
The Controversy between Joanna South- cott & Elias Carpenter	5,000	1.50
The Little Flock of Sheep		
An Answer to the World for printing the Little Flock of Sheep		
The Full Assurance that the Kingdom of Christ is at Hand	5,000	1.50

Divien & Spiritual Communications on
the Prayers of The Church of England
and the Conduct of the Clergy

List of Publications.	Number printed.	Price.
On the Prayers of the Fast Days May 1804		
The Trial of Joanna Southcott at the Neckinger House	12,000	1.50
Divine & Spiritual Letters of Prophecy Joseph Southcott's Vindication of his Sister's Character		
A True Picture of the World & a looking Glass for all Men	12,000	1.50
Answer to Garrett's Book		
Answer to the Five Charges in the "Leeds Mercyry"		
Answer to Mr. Brothers' Book published in 1806		
The Long wished for Revolution is at Hand		
Answer to False Doctrines and the Crying Sins of the Nation	12,000	1.50
The Books of Wonders, Marvellous & true 1 to 5	12,000	2.00
The Express—The Life and the Divine Writings of Joanna Southcott 6 parts complete		3.00
Index of the Complete Writings of Joanna Southcott	8,000	1.25

Pamphlets.

Woman the True Helpmeet		
The Lifted Veil		
Warning to the Jews		
Shiloh		
On Swearing to Man		
The Threatened Famine		
The Restitution of a Lost World, Etc....	1,000	10c each

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Copy

Treasury Department.

Office of Commissioner of Internal Revenue.

IT:AR:B-8. RRP-60D.

Sept. 7, 1929.

Mrs. Hugenia S. Doggett,
3733 Indiana Street,
San Diego, California.

MADAM :

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of \$1,597.88, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner,

By ————,
Deputy Commissioner.

Inclosures: Statement, Form 866, Form 882.
DMP-1.

15

Statement.

IT:AR:B-8. RRP-60D.

In re Hugenia S. Doggett, 3733 Indiana Street, San Diego,
California.

Tax Liability.

Year.	Corrected tax liability.	Tax previously assessed.	Deficiency.
1926	\$2,673.42	\$1,075.54	\$1,597.88

The report of the Internal Revenue Agent in Charge at San Francisco, California, as modified by the report of the Internal Revenue Agent in Charge at Chicago, Illinois, covering an investigation of your income tax liability for the year 1926, has been reviewed and approved.

You are advised that careful consideration has been given to the statements in your protest and to the information furnished by your representative, Mr. Maurice Cohn, at a conference held in this office June 14, 1929.

The deficiency results from the disallowance of expenses of \$8,943.83 for the reason that they were not incurred in the prosecution of a business entered into for the purpose of profit, neither were there any records to substantiate the amounts expended.

The question for decision is whether your activities as outlined in your protest constitute a trade or business regularly carried on. In *Flint v. Stone and Tracy*, 220 U. S. 107, business was defined as

“That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.”

A primary attribute of business is the conservation and increase of capital. This motive or purpose did not enter into the instant case.

Although the statute does not specifically so provide, it was obviously intended to authorize the reduction of gross income by the cost of producing such income before determining the tax liability. In this connection, there is an express provision that personal expenses are not so deductible. This principle rests on the sound basis that business

expenses represent the cost of producing income; personal expenses relate only to the uses that are made of such income. The deductions claimed by you were not expenses incurred in the production of any part of the income which the Bureau proposes to tax.

No such expenses were claimed as deductions in the year 1924. In the year 1925 the deduction claimed as the cost of traveling and of book binding was disallowed for the reason that your business was not entered into for profit. No new element appears to have arisen to change the status of such expenses in the year 1926. Your protest will therefore be denied.

Net income reported on the return	\$25,509.65
Add: 1. Expenses of publication	8,943.83
Adjusted net income	34,453.48

Computation of Tax.

Adjusted net income	\$34,453.48
Less: Exemption	1,500.00
Income subject to normal tax	32,953.48

Tax at 1½% on \$4,000	60.00
Tax at 3% on \$4,000	120.00
Tax at 5% on \$24,953.48	1,247.67
Surtax	1,260.81

Total	2,688.48
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Less:

Earned income credit	\$13.13
Tax paid at source	1.93
	15.06

Net tax assessable	2,673.42
Tax previously assessed	1,075.54

Deficiency	\$1,597.88
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Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this letter has been forwarded to your attorney, Maurice Cohn, Title and Trust Building, Chicago, Ill.

17 United States Board of Tax Appeals. Filed Nov.
27, 1929

United States Board of Tax Appeals
Docket No. 46036.

HUGENIA S. DOGGETT, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal admits and denies as follows:

Admits that before March 15, 1927, the petitioner filed in the office of the Collector of Internal Revenue for the Sixth District of California Form 1040, purporting to be her individual income tax return for the year 1926. Admits that on to-wit September 7, 1929, the Commissioner addressed to this petitioner his letter showing a deficiency of \$1,597.88 and advised the petitioner of her right to appeal to the Board of Tax Appeals within sixty days from September 7, 1929. Admits that the petitioner filed the petition herein pursuant to said letter of September 7, 1929. Admits that the amount of the deficiency is \$1,597.88. Denies the remaining allegations contained in pages 1 and 2 of the petition.

Denies that the respondent committed the errors alleged in paragraphs numbered 1, 2, 3 and 4 on page 3 of the petition.

Statement of Facts.

Admits that the petitioner resides at 3733 Indiana Street, San Diego, California. Admits that the deductions claimed by her as alleged business expenses were estimated. Admits that said deductions include an allowance for
18 alleged services of this petitioner. Denies the remaining allegations under the heading "Statement of Facts" in the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore it is prayed that the petition be denied.

(Signed)

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

L. W. CREASON,

Special Attorney, Bureau of Internal Revenue.

19

23 B. T. A. —.

United States Board of Tax Appeals.

Docket No. 46036.

HUGENIA S. DOGGETT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk U. S. Board of Tax Appeals.

Promulgated June 17, 1931.

Held, upon the evidence that the petitioner was not engaged during the taxable year in carrying on a business within the meaning of the Revenue Act and that certain expenditures made by the petitioner are not deductible as ordinary and necessary business expenses.

Eli D. Felsenthal, Esq., for the petitioner.

C. H. Curl, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax for the year 1926 in the amount of \$1,597.88. The petitioner alleges that the respondent erred in finding that the petitioner was not engaged in a "business" within the meaning of the Revenue Acts and that he erred in disallowing a deduction of \$8,943.83 claimed by the

petitioner as business expenses. The claimed amount \$8,943.83, was for the following expenditures:

Salaries.....	\$5,000.00
Automobile hire and traveling expenses.....	3,650.00
Printing.....	293.83

Findings of Fact.

The petitioner is a resident of San Diego, California.

20 The petitioner, after 1911, went to England and worked under the Bishop of England, doing social service work. While in England she became conversant with the writings and teachings of one Joanna Southcott, who died in 1814. She read the 65 works of Joanna Southcott which were in the British library. The remaining works of Joanna Southcott were supposed by her followers to be sealed in an ark in the custody of the British Parliament. The belief prevailed among the followers of Joanna Southcott that the ark would be opened by the 24 bishops of the House of Lords. These writings were to be opened in 1914, 100 years after the death of Joanna Southcott or whenever the nation's troubles demanded that they be opened. As a matter of fact, they have never been opened.

In 1917, petitioner went to San Diego and began to publish the works of Joanna Southcott. She believed that it was her duty to print these books for the benefit of the American people. She did not expect to make a great amount of profit until the ark was opened, at which time she expected a great demand for these works. She employed others to do her printing.

The petitioner, from 1917 to the present time and particularly during the year 1926, has devoted practically all of her time to the work of the printing
21 of the Joanna Southcott writings and the advertising of such printed books. She advertised in newspapers and magazines and carried banners on the rear and sides of her automobile. Altogether she has expended approximately \$38,000 on printing, advertising and incidentals. There have not been many sales of the books and about 200,000 are stored in San Diego. The selling price of the books was from 100 per cent to 200 per cent more than the cost, exclusive of selling expense.

The existing works of Joanna Southcott have been translated into Spanish, French and Hungarian and are read by her followers in the United States, England, Australia and New Zealand. There are about 50,000 of her followers in the United States.

When petitioner first started printing these books she had very little income from any source whatsoever. However, in 1923 certain real estate in Chicago which she had inherited from her husband was sold and the proceeds of that have brought her in considerable income ever since. This is her only source of income except from the sales of books. The income received from the sale of books from the years 1917 to 1926 was in an inconsiderable amount. The largest amount received from the sales of these books was \$226.88 in 1924. In 1926 the amount received from the sales was \$46.75. The petitioner did not include this amount in her income-tax return for 1926.

The petitioner left samples of books at a number of book-stores, including Marshall Fields in Chicago, so that orders could be taken, but kept no supply of the books on hand at any of these places.

22 The petitioner's assistant in this work was Percy Granger Smith. He looked after the printing of the books, helped the petitioner with the proof reading and with the advertising. He attended to the packing and also made speeches at different times in connection with the propagation of these works. During the year 1926 Smith devoted all his time assisting the petitioner in the dissemination of the hand bills and the advertising of these publications. The petitioner did not pay him a salary, but she furnished him room and board free and also furnished him money for his clothing and for incidental expenses. Smith had been an evangelist and had also worked in Marshall Field's book store.

The petitioner had hand bills printed, advertising the works of Joanna Southcott. She distributed these hand bills free of charge to different places. In 1926 the petitioner and Smith spent almost the entire year traveling in an automobile, distributing these hand bills and advertising these publications. They distributed during that year approximately 150,000 hand bills. Smith drove the car. They kept no account of the expenses of this trip, but the petitioner paid all of the expenses. They attended an

Episcopal convention in New Orleans with the hope of getting the bishops attending it interested in the opening of the ark. In all of their travels in 1926 they covered approximately 23,000 miles. They stopped at villages all along the road, left pamphlets at the libraries, camp grounds, boarding houses, and hotels, and sometimes made speeches.

23 The automobile in which the petitioner and Smith made the trip was purchased by petitioner in December, 1925, for \$2,800. She used it for about two years, at the end of which time it had but little value.

The petitioner received a considerable number of letters either inquiring about the works of Joanna Southcott or thanking her for hand bills which she had sent.

In 1926, the petitioner expended \$222 for printing hand bills. She did not expend anything in that year for printing any of the works of Joanna Southcott.

Opinion.

McMAHON: The question to be decided in the instant proceeding is whether the activities of the petitioner in the year 1926 in publishing and advertising the works of Joanna Southcott constituted a "business" so that any expenses incurred therein are deductible as ordinary and necessary business expenses within the meaning of the Revenue Acts.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the Supreme Court said:

"Business" is a very comprehensive term and embraces everything about which a person can be employed * * * 'That which occupies the time, attention and labor of man for the purpose of a livelihood or profit'. Bouvier's Law Dict., page 273.

It is clear that the petitioner in the instant proceeding did not carry on the activities for the purpose of a
24 livelihood. The only question then is as to whether her purpose was to make a profit.

In the case of *Thacher et al. v. Lowe*, 288 Fed. 994, the plaintiff was a lawyer who also did farming. The court held that his farming activities did not constitute a busi-

ness. For the two years in question the evidence showed that the expenses of the farm were over \$16,000, while the income was a little more than \$1,000 each year. The court said in that case:

* * * It does seem to me that if a man does not expect to make any gain or profit out of the management of the farm, it cannot be said to be a business for profit, and while I should be the last to say that the making of a profit was not in itself a pleasure, I hope I should also be one of those to agree there were other pleasures than making a profit. Indeed, it makes no difference whether a man is engaged in a business which gives him pleasure, if it be a business; that is irrelevant, as was said in *Wilson v. Eisner*. But it does make a difference whether the occupation which gives him pleasure can *honestly be said to be carried on for profit*. Unless you can find that element it is not within the statute, and I cannot see in this case even the first intimation of a reason to *suppose that Mr. Davies in his lifetime carried on this farm with the hope of a profit, or that if he had not got anything else out of it except the money which he did get he would have kept on.* [Italics ours.]

In the case of *Deering v. Blair*, 23 Fed. (2d) 975, where the taxpayer resided in New York and was occupied with financial affairs there, but maintained a farm where horses were bred, it was held that his farming activities did not constitute a business, in view of the fact that the farm was operated over a long period of time, i. e., about 20 years, at a loss.

The fact that the petitioner had carried on this work for about 10 years and had derived only an inconsiderable amount of gross income therefrom, while expending large amounts in the work, brings the instant proceeding
25 within the ambit of the two cases just above cited.

The petitioner cites the cases of *Plant v. Wash*, 280 Fed. 724; *Wilson v. Eisner*, 282 Fed. 38; and *George D. Widener, et al.*, 8 B. T. A. 651, affirmed in *Commissioner v. Widener*, 33 Fed. (2d) 833.

In these cases relied upon by the petitioner, while the parties were carrying on occupations at a loss, it was clear that there was some chance of a profit and a reasonable expectancy thereof. We are of the opinion that in order

for an occupation to constitute a "business" within the meaning of the definition given by the Supreme Court, it must not only be entered into for profit, but that there must be a reasonable expectation of making a profit within a reasonable time. In the instant proceeding it appears from the testimony of petitioner that she did not expect to realize any considerable profit until the opening of the ark and that this depended upon events beyond petitioner's control. There is no evidence to show that any profit could be reasonably expected during petitioner's lifetime. These factors distinguish this case from the cases relied upon by the petitioner. Petitioner's expectation of profit was too uncertain, too fanciful, too remote and too unreasonable to bring the petitioner's activities within the definition of "business" as laid down by the Supreme Court.

We have not overlooked the testimony of petitioner and her assistant, which is not disputed, to the effect that
26 she intended to make the publication of these works her business and expected to derive a profit therefrom. In our view that testimony can be readily reconciled with the conclusion we have reached. As heretofore indicated, it requires more than a mere intention or expectation of profit to establish that a person is actually engaged in "business".

We therefore hold that the petitioner was not engaged in a business and that she is not entitled to any of the claimed deductions.

Reviewed by the Board.

Judgment will be entered for the respondent.

27 United States Board of Tax Appeals, Washington.

Docket No. 46036.

HUGENIA S. DOGGETT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated June 17, 1931, it is

Ordered and decided that there is a deficiency of \$1,597.88 for the year 1926.

Enter.

(Signed)

STEPHEN J. McMAHON,
Member.

Entered Jun. 19, 1931.

A true copy. Teste:

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

28 United States Board of Tax Appeals. Filed Dec.
11, 1931.

In the United States Board of Tax Appeals.

Docket No. 46036.

HUGENIA S. DOGGETT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause by their respective attorneys that pursuant to Section 1002 (d) of the Revenue Act of 1926 the decision of the United States Board of Tax Appeals in the above entitled case may be reviewed by the Court of Appeals of the District of Columbia.

CLARENCE N. GOODWIN,
Attorney for Petitioner.

C. M. CHAREST,
*General Counsel, Bureau of Internal
Revenue, Counsel for Respondent.*

29 United States Board of Tax Appeals. Filed Dec.
11, 1931.

In the Court of Appeals of the District of Columbia.

B.T.A. No. 46036.

HUGENIA S. DOGGETT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

*Petition for Review in the Court of Appeals of the District
of Columbia and Assignment of Errors.*

Now comes Hugenia S. Doggett by her attorney,
Clarence N. Goodwin, and respectfully shows:

I.

Petitioner is a citizen of the United States, residing at San Diego, California; she duly filed her income tax return for the calendar year 1926 on the proper date therefor, with the Collector of Internal Revenue in and for the Sixth District of California whose office is located in Los Angeles, in the State of California; petitioner's residence was in 1926 and still is located in the City of San Diego, in the State of California. A stipulation in accordance with Section 1002 (d) of the Revenue Act of 1926 that this case shall be reviewed by the Court of Appeals of the District of Columbia has been executed by counsel for both petitioner and respondent and filed with the Clerk of
30 the United States Board of Tax Appeals and made a part of the record in this case. Jurisdiction to review the decision of the United States Board of Tax Appeals is conferred on this court by Sections 1003 (a) and 1003 (b) of the Revenue Act of 1926.

II.

The nature of the controversy is as follows, to-wit:
Petitioner, during the calendar year 1926, was a resident of San Diego, California. In 1911, petitioner went to England and worked under the Bishop of England doing social

service work. While there she became conversant with the writings and teachings of Joanna Southcott, a religious teacher and prophetess who died in 1814. She read the sixty-five works of Joanna Southcott which were in the British Library. The remaining works of Joanna Southcott are supposed by her followers to be sealed in an ark in the custody of the British Parliament and her followers believed that the ark would be opened by the twenty-four bishops of the House of Lords. These writings were to be opened in 1914, one hundred years after the death of Joanna Southcott, or whenever the nation's troubles demanded that they be opened. The writings have not yet been opened.

In 1917 petitioner returned to this country, went to San Diego and began to publish the works of Joanna Southcott. Petitioner had two motives for entering into the publication of these books. She believed that it was her duty to print them for the benefit of the American people, and she also expected to derive a large profit from the sale
31 of these books after the ark was opened. She did not expect to make a great amount of profit before the ark was opened but she expected a great demand for these works to follow the opening of the ark. Petitioner believed each year from the time she began publishing these books in 1917 up to and including the taxable year, that the time was immediately at hand when the ark would be opened and petitioner would realize a great profit from the sale of Joanna Southcott's works. She employed others to do her printing.

The petitioner, from 1917 to the present time and particularly during the year 1926, has devoted practically all of her time to the work of the printing of the Joanna Southcott writings and the advertising and sale of such printed books. She advertised in newspapers and magazines and carried banners on the rear and sides of her automobile. Altogether, she has expended approximately Thirty-eight Thousand Dollars (\$38,000.00) on printing, advertising and incidentals. There have not been many sales of the books and about two hundred thousand (200,000) are stored in San Diego. The selling price of the books was from one hundred per cent (100%) to two hundred per cent (200%) more than the cost, exclusive of selling expense.

The existing works of Joanna Southcott have been translated into Spanish, French and Hungarian and are read by her followers in the United States, England, Austria and New Zealand. There are about fifty thousand (50,000) of her followers in the United States.

When petitioner first started printing these books she had very little income from any source whatsoever. However, in 1926 certain real estate in Chicago which
32 she had inherited from her husband was sold and the proceeds of that have brought her in considerable income ever since. This is her only source of income except from the sales of books. The income received from the sale of books from the years 1917 to 1926 was at no time more than Two Hundred Twenty-six Dollars and Eighty-eight Cents (\$226.88) in any one year, and in 1926, the taxable year in question, the amount received from the sales was Forty-six Dollars and Seventy-five cents (\$46.75).

Petitioner left samples of books at a number of book stores, including Marshall Field's in Chicago, so that orders could be taken, but kept no supply of the books on hand at any of these places.

Petitioner's assistant in this work was Percy Granger Smith. He looked after the printing of the books, helped the petitioner with the proof reading and with the advertising. He attended to the packing and also made speeches at different times in connection with the publication of these works. During the year 1926 Smith devoted all his time to assisting the petitioner in the dissemination of the hand bills and the advertising of these publications. Petitioner did not pay him a salary but in return for his services she furnished him room and board and also furnished him money for his clothing and for incidental expenses. Smith had been an Evangelist and had also worked in Marshall Field's book store. The services of Mr. Smith were worth at least Thirty Dollars (\$30.00) a week and if petitioner had paid him a straight salary, she would have

had to pay him Thirty Dollars (\$30.00) a week,
33 furnishing him with board and lodging. Petitioner claimed a deduction of Fifteen Hundred Dollars (\$1500.00) as "salary" paid to Mr. Smith, which deduction was disallowed by the Commissioner and the United States Board of Tax Appeals. No deduction has been allowed for

any of the amounts paid out in behalf of Mr. Smith as stated above.

The petitioner had hand bills printed advertising the works of Joanna Southcott. She distributed these hand bills free of charge to different places. In 1926 the petitioner and Smith spent almost the entire year traveling in an automobile distributing these hand bills and advertising these publications. They distributed during that year approximately one hundred fifty thousand (150,000) hand bills. Smith drove the car. They kept no account of the expenses of this trip but petitioner paid all of the expenses. In all their travels in 1926, they covered approximately twenty-three thousand (23,000) miles. They stopped at villages all along the road, left pamphlets at the libraries, camp grounds, boarding houses and hotels, and sometimes made speeches. Petitioner estimated the expenses of this trip at Ten Dollars (\$10.00) a day, which would cover the expenses for gasoline, repairs, tires and depreciation of the automobile, and deducted Three Thousand Six Hundred Fifty Dollars (\$3,650.00) from her gross income on account of this item. This deduction was disallowed in its entirety by the Commissioner and by the United States Board of Tax Appeals. The automobile in which the petitioner and Smith made the trip was purchased by petitioner in December, 1925, for Twenty-eight Hundred Dollars (\$2800.00). She used it for two (2) years, at the end of which time it had but little value.

The petitioner received a large volume of mail, either inquiring about the works of Joanna Southcott or thanking her for hand bills which she had sent.

During 1926, the taxable year in question, the petitioner expended Two Hundred Twenty-two Dollars (\$222.00) for printing hand bills. She did not expend anything in that year for printing any of the works of Joanna Southcott.

The Commissioner of Internal Revenue determined a deficiency in petitioner's tax for the year 1926, in the amount of One Thousand Five Hundred Ninety-seven Dollars and Eighty-eight Cents (\$1,597.88) and petitioner filed her petition to the United States Board of Tax Appeals for a redetermination of her tax for the year in question by the United States Board of Tax Appeals and therein claimed that there was no deficiency for the aforesaid year for the reason that petitioner, during the taxable year in

question, was engaged in carrying on a business within the meaning of the Revenue Acts and that the deductions which had been disallowed by the Commissioner resulting in the deficiency in question were legitimate expenses incurred in her business which she was entitled to deduct from her gross income.

After answer was filed by the respondent, a hearing was had before the United States Board of Tax Appeals upon the petition and testimony in the case was taken May 12, 1930. Findings of fact and an opinion were promulgated by the Board on June 17, 1931, and a final order determining a deficiency of One Thousand Five Hundred Ninety-seven Dollars and Eighty-eight Cents (\$1,597.88)
35 was entered June 19, 1931.

III.

Petitioner, being aggrieved by the conclusions of law contained in said petition and by said order determining said deficiency, desires to obtain a review thereof by the Court of Appeals for the District of Columbia; wherefore she petitions that a transcript of record be prepared in accordance with the rules of the said Court of Appeals of the District of Columbia and transmitted to the Clerk of said Court for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the Court of Appeals for the District of Columbia.

IV.

Petitioner's assignments of errors are as follows:

1. The United States Board of Tax Appeals erred in determining that there was a deficiency in income tax due from the petitioner for the calendar year 1926 in the amount of One Thousand Five Hundred Ninety-seven Dollars and Eighty-eight Cents (\$1,597.88).

2. The United States Board of Tax Appeals erred in holding that petitioner, on the facts found, was not engaged in a business within the meaning of Section 214 (a) of the Revenue Act of 1926.

3. The United States Board of Tax Appeals erred in holding that the activities of the petitioner in the year 1926

36 in publishing and advertising and selling the works of Joanna Southcott, did not constitute a "business" so that any expenses incurred therein are deductible as ordinary and necessary business expenses within the meaning of the Revenue Act of 1926.

4. The United States Board of Tax Appeals on the facts found erred in disallowing the deduction of Fifteen Hundred Dollars (\$1500.00) from petitioner's gross income for the year 1926 on account of amounts paid to and in behalf of her assistant, Percy Granger Smith.

5. The United States Board of Tax Appeals on the facts found, erred in disallowing the deduction of Three Thousand Six Hundred Fifty Dollars (\$3,650.00) claimed by the petitioner on account of automobile expense and depreciation incurred in her business during the year 1926.

6. The United States Board of Tax Appeals erred in not holding that the petitioner was entitled to a deduction from her gross income for the year 1926 in the amount of Two Hundred Twenty-two Dollars (\$222.00) expended in printing hand bills and advertising the works of Joanna Southcott which she was engaged in publishing and selling.

7. The United States Board of Tax Appeals erred in not holding that petitioner was entitled to a deduction from her gross income for the year 1926 of One Thousand Four Hundred Dollars (\$1,400.00) as depreciation on the automobile used in her business in that year.

37 8. The United States Board of Tax Appeals erred in holding that in order for an occupation to constitute a business within the meaning of the Revenue Act of 1926, it must not only be entered into for profit but that there must be a reasonable expectation of making a profit within a reasonable time.

9. The United States Board of Tax Appeals erred in holding that on the evidence and facts found, petitioner's expectation of profit was too uncertain, too fanciful, too remote and too unreasonable for petitioner's activities during the year 1926 to constitute a business within the meaning of the Revenue Act of 1926.

CLARENCE N. GOODWIN,

Attorney for Petitioner,

7 South Dearborn Street,

Chicago, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

Clarence N. Goodwin, being first duly sworn, on oath says that he is the attorney for the petitioner in the above entitled case and as such, is duly authorized to verify the petition for review by the Court of Appeals for the District of Columbia of the decision in the said above entitled case; that he has read the petition for review and knows the contents thereof and that the same is true in substance and in fact.

CLARENCE N. GOODWIN.

Subscribed and sworn to before me this 11 day of December, A. D. 1931.

[NOTARY SEAL.]

GODFREY L. MUNTER,
Notary Public.

38 United States Board of Tax Appeals. Filed Dec. 11,
1931.

In the Court of Appeals of the District of Columbia.

B. T. A. No. 46036.

HUGENIA S. DOGGETT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Notice.

To the Commissioner of Internal Revenue:

You are hereby notified that I have on this — day of December, A. D. 1931 filed with the Clerk of the United States Board of Tax Appeals a petition for review by the Court of Appeals of the District of Columbia of the decision of said Board in the above entitled case. A copy of the petition for review and assignments of error is attached herewith.

CLARENCE N. GOODWIN,
Attorney for Petitioner,
7 South Dearborn Street,
Chicago, Illinois.

Received a copy of the above notice, together with a copy of the petition for review and assignments of error, this 11th day of December, 1931.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

39 Received Jan. 18, 1932, U. S. Board of Tax Appeals.

United States Board of Tax Appeals. Lodged Jan. 19, 1932.

Filed Jan. 20, 1932.

In the United States Board of Tax Appeals.

No. 46036.

HUGENIA S. DOGGETT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Agreed Statement of the Evidence.

Frank A. Frye.

FRANK A. FRYE, called as a witness for petitioner, on oath testified as follows:

He is engaged in the commercial printing business in San Diego, California; he has lived there forty years and has been engaged in the printing business thirty odd years; the name of his concern is Frye and Smith. He has known the petitioner, Hugenia S. Doggett, since 1918, and since that time has seen her almost daily; she came into his establishment early in 1918, stated that she was in the business of printing and republishing the writings of Joanna Southcott, and asked his firm to undertake the printing part of it, and they have been dealing with her almost continuously since that time. She explained that she thought that after a certain time there would be a very great sale for the books; of course, she thought it was coming earlier than it has; she wished to have their firm publish some seventy-five books. He identified certain volumes shown to him as the first books printed by his firm for Mrs. Doggett in 1918. After that, they printed all of her books and numer-

ous circulars from 1918 to date; some were printed every year, and they have some in their plant at the present time. Mrs. Doggett has already paid him close on to \$36,000.00 for printing. Mrs. Doggett has explained her expectations and purpose to him numerous times and she always claims that in a very short time there is going to be a very great sale for the books; he believes that she actually thinks
40 so. He took into consideration the fact that his business might be greatly increased when the demand came for the books, and made a lower rate accordingly. He is not related to Mrs. Doggett and has no relation to her except in business; numerous communications come into his office for Mrs. Doggett; he would say that the demand for the books is increasing. In connection with his business he runs a couple of automobiles, has been operating them for about twelve years; he is familiar with Mrs. Doggett's car, knows that it has banners on the front and rear which state she is selling Joanna Southcott publications; she has had that for a number of years; she never takes off these cards; wherever she drives the car the signs are there, including Sundays and holidays. He knows that in 1926 she started on an extensive trip through the country; he believes she was driving a Stutz car; he knows that she actually made this trip all through the country, because all through the year he had communications from her from various parts of the country. He has a fair idea of what the cost of operating such an automobile in a business is and knows that it would be in the neighborhood of twelve cents per mile. He thinks twelve cents a mile would be a fair charge, and would say that the records in his business would bear that out.

Cross-examination:

He feels sure that when Mrs. Doggett first came into his office she said that she was "in the business of;" he has not been talking to her a good deal about this case; he has been talking to the attorney about it; he does not think he stressed that the first thing she said when she came into his office was "I am in the business of." Mrs. Doggett came into
41 his office; wanted his firm to undertake to do this work for her and he wanted to know where the money was coming from; he wasn't acquainted with Mrs.

Doggett at that time. He knew the cost of the printing would run into a considerable amount and so she really stated that she was going to publish all of the works of Joanna Southcott and was going to devote all her work to the publication and sale of her books. He believes that he recalls specifically that she told him she was in this business; he does not think that he got that belief since he had been thinking about it. On the same date she said that when this box in England was opened there would be a very great amount of business to be done; that she wanted us to act for her as her publisher and printer. He does not know that she satisfied them at that time that she could pay her bills but later she did. When he said "increase" he meant that there had been an increase in the correspondence; he knows that a small amount of sales were made; they told him they had sold a small amount, small quantities; he does not know what the sales have been at all; the books have been stored up; he has never seen their storehouse. When Mrs. Doggett is away he stores her mail up for her and takes care of it; he does not open the mail; he would have no way of knowing if the business was increasing but this, that naturally if the correspondence was increasing, the business was increasing.

Hugenia S. Doggett.

HUGENIA S. DOGGETT, called as a witness on her own behalf, on oath testified as follows:

42 She is sixty years of age, she lives in San Diego, California, has lived there twelve odd years; she formerly lived in Chicago, came there in 1887 when she was married, and her husband's name was George Newell Doggett; he passed away in 1898. There was a child born of that marriage who passed away in 1911. She owns certain property in Chicago, which is the proceeds of the sale of certain real estate in Chicago that was devised to her by her husband. That real estate was sold in 1923 and the income which she derives now is from the investments made from the proceeds of that sale and is her sole income outside of what she may have received in the matter of these publications. Until that property was sold in 1923 expenses in connection with the property in Chicago were in excess of her income so that there was no money received prior

to that time. She came to San Diego to live in 1905 and lived there until her daughter passed away in 1911. She then went to England and worked under the Bishop of England in social service work. She remained in England until 1915 and while doing this social service work became conversant with the writings of Joanna Southcott; she made herself conversant with the sixty-five publications of Joanna Southcott in the British library and when she returned to America began publishing them. When she returned to America she stayed in Chicago until 1916 and then went back to San Diego; she began to publish the books in 1917; the first books were not printed by Frye and Smith but by Mandigo and Neynesch. Subsequent to the year 1917 she began with Frye and Smith and has been doing business with them ever since; she identified the books which she had published and a list of all the books. All were printed by Frye and Smith except those mentioned as having been printed before. The publication and sale of
43 the books has taken all of her time since she started in 1917; she did not give any time to social matters; she printed the prices of the books on the little handbills which she identified. A list of all the publications, their prices, and the number printed of each book was offered and received in evidence. None of these books were printed in the year 1926; she was doing propaganda work during that year, distributing handbills. The handbills demonstrating the work were distributed in every manner of public distribution; all the highways and every place was stocked, and every bookstore, the convention hall and every library; the handbills were kept in the car and were distributed every place. She distributed 150,000 of these handbills in 1926; no books were printed in 1926. When she returned to America her idea was solely to make the reprinting and distribution of the books of Joanna Southcott her business; she stated so to everybody; she thought that it was her duty to come back home to her country and print these books for the benefit of the American people; she expected to make a profit out of it for herself because it was a business and she felt that she was well adapted to that kind of business. When she first started in this business she went in in a small way and later when she sold her property she put in more money; she really and truly expected that the publication of this literature would yield

her financial advantage and she still thinks so; she thinks that it is a venture which she has to finance. She has nearly 200,000 of these books now stored away and she thinks there will be a call for them for the reason that those records that are not open and are in the box might be opened
44 by the Government; the box contains 126 pounds of manuscript which has got to be opened upon a crisis and without these writings they wouldn't understand the box. They must have these writings as a key as to what the box contains; she has felt for the last four or five years that in the next year the box might be opened; she believes that the people will demand it because it says in one of the books that there will not be enough literature to furnish the demands of the public when the box is opened and that is her reason for storing these up until that time. She has spent more than \$50,000.00 for printing these books, including printing, binding and incidentals; it is her honest conviction that she is going to get that money back and also to get a percentage on what she has invested. She has made every possible effort to sell these books by advertising in the newspapers and magazines, and has carried banners on her car. She has always carried her handbills and books in her car and in 1926 she went from San Diego to a convention in New Orleans, and from there traveled over many of the states of the United States and parts of Canada; she was constantly traveling all through the year 1926; from the time she left she covered 23,000 miles on the trip; she fixes that figure by the register on the machine. While on the trip, she stopped at villages all along the line and stopped at the filling stations, library, camping grounds, boarding houses, hotels, etc.; she would hand them the leaflet and say "This is something most interesting and very important, too," and if there was a library there she would put a bunch of
45 the leaflets on the library table for free distribution. While at the Episcopal Convention in New Orleans she approached many bishops there and many others, handed them the leaflet and explained to them the reason for opening the box; she thought that the Episcopal Convention might have some influence on the Church of England to open the records and get the manuscript on account of their relationship to the Church of England; during 1926 and through the intervening years up until now she went all over the country, distributing literature at all times and all

places; her purpose is to develop a demand for these books she is having printed; she has succeeded in a rather modest way; the books she has sold in the last year do not run over \$150.00. Percy Granger Smith assisted her in her work; he worked with her in London and came back with her to this country in 1915, going directly to San Diego and has been there all of the time. He was her general assistant. He read the proof on every book with her; sometimes they read it six or seven times; he drove her car, attended to the packing and all the work that had to be done. She had no help besides Mr. Smith unless it was necessary to have somebody lift the boxes and things of that kind. He was her general assistant and helper and had valuable knowledge of this work; he might be called an Evangelist; he has been her assistant ever since she began this work. She did not pay him a salary exactly but gave him his expenses and any money that he needed and furnished him with incidentals; she paid his bills and expense on the road and provided a home and lodging for him in San Diego all the time; he has been constantly with her all of the time and she provided him with his keep and furnished him with expenses
46 and small cash and things of that kind; she gave him \$500.00 on several occasions during the trip in 1926 for the expenses of the trip. In her returns for 1926 she stated an item of salary paid as \$5,000.00, \$3,500.00 of which was for herself and \$1,500.00 for Mr. Smith. That \$1,500.00 included board and lodging, and spending money for himself and incidentals at the rate of \$30.00 a week. If she had had to pay for his services in cash, furnishing him with board and lodging she would have had to pay \$30.00 a week and she now seeks to deduct from her income expense of Mr. Smith in the amount of \$1,500.00. She is willing to have the amount of \$3,500.00 as salary for herself disallowed. She asked for an allowance of \$3,650.00 deduction for depreciation, gasoline, repairs, tires and other expenses of her automobile, which amount she figured at the rate of \$10.00 a day. She kept no records or books on her automobile expenses except the cost of the automobile itself. The Stutz car which she used cost her \$2,800.00; it was a used car, having been used a little bit as a demonstrator. She figured that \$10.00 a day was a fair item of cost for the automobile for every day of the year; she did not use it at all for

pleasure. She bought the car in December, 1925 and used it for two years including 1926; at the end of the two years the car was almost wrecked. Mr. Smith drove the car during the entire period and he is familiar with these figures, too. Besides advertisements in the public press and leaflets, she had agencies for the sale of these publications in Hollywood, Texarkana, Des Moines, San Diego, Marshall Field's in Chicago, and other places, mostly in the
47 Middle West and Central States. Her idea in putting in agencies was to make a demand for the books and put them where they would be observed. She left a copy of each book and gave them handbills so that books might be ordered from the handbills and the sample copies. She did this to make it a business so she would be known. She regularly received communications concerning these publications; she generally got her correspondence at Frye and Smith; her correspondence is increasing; the character of the communications was inquiring about the publications; she received sometimes as many as thirty and forty letters a day; a good deal of this correspondence is conducted in Mr. Smith's name, but she pays the expense and it is her business. Some of the correspondence is letters thanking her for leaflets or pamphlets. Her income is computed by her fiscal agent in Chicago and no question has ever been raised about that that she knows of. She thinks the books have been examined on that for 1926. She has a repository for the books for the people's reference in San Diego which is indicated by sign. Her publications are offered for sale at the reference room and in the back of that room is her residence.

Cross-examination:

She returned from Europe in 1915; the books which she examined there were reprints of the original books and her publications are merely copies; she has reprinted all sixty-five volumes. There has been some sale of those books; she has never reported any sale of them because they were less than \$150.00 a year; there is no income from the sale after deducting the postage; she keeps a journal and puts down in it anything that comes in. In 1926 she sold in the neighborhood of \$45.00 worth of books; Mr. Smith keeps
48 the record; according to the record book she sold in that year \$46.75; she did not report that \$46.75 on her

income tax return because it was such a small amount that she had paid that in postage and incidentals. She did not sell books to her agencies over the United States that she spoke about; she sent them specimen books with the handbills; she did not have any books at Marshall Field's in 1926; she did not have a stock of books at any of these agencies in 1926 except at Hollywood; from all these different agencies in 1926 she sold \$46.75 worth of books; in 1920, at the Hollywood Bookstore, she sold \$150.00 worth; she thinks that as large as any year; she did not report that as income because she had no income at that time. She first began to put these books on the market from the middle of 1916 to 1917, and in 1926 her sales reached the sum of \$46.75. Her expectation that the Ark containing the writings of Joanna Southcott will be opened upon the happening of some crisis is based on the reason that all of these records that had been given in the year 1814 were given for a hundred years to come and the arrangement was made that the books should not be opened until the hundred years were up in 1914. There is ten years' grace; she does not know exactly when the hundred years are up; the opening of the Ark is dependent upon the action of Parliament and the House of Lords; possibly they can open it or refuse to open it as long as they please; the followers of Joanna Southcott are urging them to open it; her idea is to create a demand for these books and when the box is opened the demand will be so great that she will not be able to furnish them. It is in the records that the box should be kept sealed for a hundred years; before the box was finally sealed

49 sixty-five publications were taken out and that is the work that we secured the originals from; she happened to have the original books; they had the original date on them, and she secured them from one of the main libraries in London. From her personal investigation she feels sure that the Ark containing the writings is there; it has remained in the possession of Parliament from 1814 up to the present day; the hundred years did not necessarily expire sixteen years ago; there is no specific time excepting in one hundred years that it should be opened for the edification of the nation; it is an international affair; she believes that the Ark will be opened in time for her to make a business out of it. She kept no book account of her expenses on the trip in 1926; she estimated that she had

spent \$3,650.00 on her automobile in traveling 23,000 miles on that trip. She passed out bills and made her work known by the signs and by talks all along the road; sometimes she stopped a couple of days in a town; her automobile was kept going almost all the time except at night. Mr. Smith has been with her since 1916; he is not a relative; he was infatuated with her young daughter and after her daughter's death he stayed with her; they both lived in San Diego; he has his home and she has hers; she pays all of his expenses and furnishes him money for his clothes and wants of that kind, and other incidentals; she estimates that she can do that for \$1,500.00 a year; he does not help her with the housekeeping; he does not mow the yard; she employs a man for hard labor and work; Mr. Smith has all he can do to take care of the publication work. All of her time was

50 occupied in the preparation of these papers in 1926; she was away all of 1926; all Mr. Smith did in 1926 was to drive her automobile and assist in passing out literature and he often spoke in public; his speeches were entirely on this work. Her object was to advertise the books and to help the people in doing that; she has to wait until the crisis to sell her books in order to keep it going as a business to give the public knowledge of the books; she paid Mr. Smith money in 1926, but not any definitely large sums in that time. She bought the Stutz car that was used in 1926 on the last day of December, 1925; it was a demonstrator; it was the car used in 1926. When the nation's troubles demand it, the manuscripts left with Parliament will be opened; there was sufficient demand for the opening of the box in 1914 when the World War began but it wasn't quite severe enough. She did not report the money for selling her books when she was taking the deductions because it was just a matter of postage; it was such a small amount that it wasn't material; she took a deduction for \$3,500.00 salary for herself but did not report that as salary; it was not intentional; she did not know at that time that it would lessen her tax; she did not draw her own income tax return; it was an omission on her part; she did not put down the sale of books because it was a minimum sum and she spent so much for postage that she decided that it wasn't material; the failure to report the \$3,500.00 was a want of knowledge. The automobile was hers; Mr. Smith never paid anything on it; she paid the money in all the automo-

biles; when she put down the word "salary" she meant that to be her salary and Mr. Smith's; she identified her signature on her income tax return which was offered in
51 evidence. She figured the expenses on her automobile as approximately \$10.00 a day; she figured wear and tear on the tires, depreciation, and all of those things in on it. Mr. Smith made the entries in the books; the letters she received in 1926 sometimes contained orders for the books; some copies of books sold for ten cents; she had to send the orders back to San Diego to have them filled. Some of the letters she received asked her to give a more full account and some were of a more investigating or inquiring character.

Redirect examination:

In making up her income tax return for 1926 she consulted with Colonel Dodge of the Internal Revenue Office; the things that she put in her return and the answers that she inserted were the result of the help she got from Colonel Dodge; she went to him twice; she told Colonel Dodge the facts in relation to her income when she went there in 1926 and he directed her in all that she did in connection with her return. Colonel Dodge is a member of the Internal Revenue Bureau in the Collector's Office in San Diego.

Recross-examination:

She does not think she expressed to Colonel Dodge that this expense of \$5,000.00 included a salary of \$3,500.00 to herself; she does not think she told him how the salary was taken care of; she thinks it is Colonel Dodge's writing on her return; he wrote down just what information she gave him; she does not think he inquired about the sale of books she made; she told him what she had been doing; he knew that she was in the business of selling books; she
52 thinks she told him she made some sales; he did not put it down because the sale was so small; she thought the postage was more than the sales and she did not think it was worth while; he did not help to arrive at the figure of \$3650.00 for the automobile; she arrived at the \$5000.00 herself; she gave Colonel Dodge as much of

the detail as she could; she could not say that he advised her to leave out anything.

Percy Granger Smith.

PERCY GRANGER SMITH, called as a witness for petitioner, on oath testified as follows:

He lives in San Diego; has lived there twenty-five years; has known Mrs. Doggett eighteen to twenty years; he knew her in London in 1911 or '12; he was over there himself; he also studied writings of Joanna Southcott at the library; he studied them together with Mrs. Doggett and came back to America with Mrs. Doggett in 1915 and went to San Diego in 1916. Mrs. Doggett came later. Since 1916 his occupation has been a salesman in books and working with the publications of Joanna Southcott; he worked in conjunction with Mrs. Doggett; he looked after the printing, checking up the printing, including the covers and including proof reading, and the assembling of the propagation of the publications in general; his time from 1916 up to the present time has been taken up most entirely on this work. In 1926 his occupation was in regard to Joanna Southcott publications, as a representative of those writings; he was the driver on the automobile trip that was testified to; he

53 was a chauffeur, general overseer of the trip; he assisted Mrs. Doggett all through that year; he gave his entire time that year to the propagation of the writings; he kept some books for Mrs. Doggett in relation to these publications; he identified his entries in a profit ledger book; he made all of the entries in there; that is the book of original entry; he kept in that the printings and the amounts of whatever publications of the books, the pamphlets, and the handbills; the account with Frye and Smith shows the cost of the different publications; he made an extract from that and got a list of the publications from it; the list shows the cost of these publications, the number of each publication is printed and shows the books still on hand and the number of books that have been printed. Mr. Frye's testimony that he had printed books to the extent of about \$36,000.00 corresponds with the books in a general way. Mandigo and Neynesch had printed the books in 1916. They printed about \$2,000.00 worth and to give the total cost of printing that was to be

added to the \$36,000.00 paid to Mr. Frye. He remembers an amount of sales of \$46.75 in 1926; it means the total of the 1926 year; he does not have in his record any outgo by the way of postage stamps, hauling or expressage for the sale of books during that year; he does not know what those expenses were for the year 1926; he knows the amount of money that was taken in for the books was \$46.75 but does not know the expense. The expense of printing in 1926 was \$293.00; there were many entries for postage stamps and things like that; the expenditures other than printing for 1926 were at least \$50.00; there were other expenses in connection with the work; he did not keep any record of the expenses; there are no ac-

54 count books of any kind that show it except in a trivial way in regard to the printing and in regard to the distribution of the leaflet, but he can state without a record that approximately \$50.00 was paid out in 1926 for postage and incidental items; in addition, pamphlets and handbills were printed in that year, one of which was identified and received in evidence; the handbills were printed by Frye and Smith in that year; the total expense for printing handbills in that year was \$222.00. In the return for 1926 the total for printing was given as \$293.00; that was an error, including some expenses incurred which should have been included in 1927, the correct amount for printing expense in 1926 was \$222.00; the bills for printing were all paid. The sales for 1926 were \$46.75; during that year he was away from San Diego the full year on the road traveling through various parts of the United States and Canada; he covered approximately 23,000 miles; he traveled in a Stutz car; it was bought in December, 1925 on the 29th day of the month; he paid out money for repairs on that trip; he has some of the bills here; the Indianapolis bill was \$75.00 or \$76.00; he got gasoline and oil at stations all along the line and he made repairs at the stations he has indicated and others; he accompanied Mrs. Doggett on that trip; he did not get anything for his services; he expected to be compensated in expenses for board and room, and lodging; Mrs. Doggett furnished those to him; he was willing to abide by Mrs. Doggett's decision that that was the value of the services he was performing; he has never filed an income tax return himself. He knows

about the sale of books for years other than 1926;
55 the largest sales were in 1924; the amount that year
was \$226.80. Mrs. Doggett has told him what her
purpose was in going into the printing and distributing
of these books; at the commencement of the year 1916 and
many times since then she has said that these publications
were worthy of the world's attention; that they should be
disseminated through the length and breadth of the world;
and that San Diego was the only place in the United States
that was interested in the propagation of these wonderful
writings; her purpose was in giving out this wonderful
work and the information, and also that there would be a
great demand for all the publications which could be
printed, and that the prices, regardless of the number,
would be greatly called for all of the publications. She
devoted her time and money to the propagation of this
work, expecting to get a big return when a demand was
made by and through the opening of the box of sealed
writings, and that is his own belief. There are 192,000 of
the books now stored. Mrs. Doggett has apprised him of
her expectation that when the box was opened the demand
would be so great that they would not be able to supply
the demand; she did not expect to give away the books
but to sell them at the stated prices mentioned on the
advertising sheets; the prices stated are from one hundred
to two hundred per cent more than the cost of the books;
the sale price exceeds the cost by two hundred per cent.
She made a profit on the sale of the books that large ex-
clusive of the selling expense. All of the books listed
there, if they are sold at the prices that are named, would
yield Mrs. Doggett a profit, provided the selling expense
did not wipe it out; the discrepancy between the
56 cost and selling price covers the overhead in selling;
these things were considered by him and Mrs.
Doggett and were discussed between them. In 1926 Mrs.
Doggett's expectation undoubtedly was that the selling
of these books would yield her a profit; she expected to
sell at a profit. The writings of Joanna Southcott are
being read or followed in Australia, New Zealand and
England, as well as in the United States; there are 50,000
of her followers in the United States; the interest in this
subject is much greater since the publication of these
books; that is manifested by the attitude of the people, the

inquiries from different parts of the United States, some demand from Australia, and some demand for them in England. Some demand for these publications comes to Mrs. Doggett from foreign countries and she furnishes them; there are other people in these foreign countries who are putting out these books; some of the works have been translated into the Spanish, French and Hungarian languages.

Cross-examination:

There is a great interest in the publication-; he means interest in the truth of the woman Joanna Southcott and her publications; quite a number are interested enough to buy books; 50,000 people all over the United States are interested in this work; the demand will be greatest when the crisis occurs that Mrs. Doggett is speaking about; he does not expect to get any large profit out of the business up to the time that it occurs. He does not say that he is an Evangelist but he is interested in this work and he preaches the truth wherever he goes; he has an apartment in Mrs. Doggett's house in San Diego and takes all of his meals from her; she buys his clothes; he has no
57 source of income whatever other than her otherwise than from the proceeds of the writings of Joanna Southcott; he does not have any financial interest in it but a big general interest, devoting all of his time for the development and the printing, and the search, and the stocking, and everything appertaining to the work of the production of these reprints. He is primarily interested in Mrs. Doggett's welfare, but he is also interested in the human side, too. It is not exactly true that he and Mrs. Doggett are more interested in taking people away from their troubles than in any money they are going to make out of it; the primary consideration is making a profit out of the books; he believes that the crisis when the box will be opened will occur in the near future; he believes that the time is close at hand. He is not primarily interested in the opening of the box but in the dissemination of these writings outside of the box because of the profits that are attached to them and because every time you sell a book you make a profit and through providing those people with

the knowledge contained in those books. The sales put down in January, 1926, started in January and were all of the sales made that year; he made the record after he returned from the trip; he made it up some time in 1927 from notes that he had. The pamphlets were given out free. In 1913 he was a salesman in Marshall Field's; he had charge of the Bible Department in Carpenter's Bookstore in 1919; Mrs. Doggett was there too at that time working in the bookstore. In 1926 he did nothing else besides work for her; he ran the automobile and was an assistant to her in all things; he lived with her and all he got out of it was his board and keep and clothes, and he estimated that as \$30.00 a week; she paid his expenses during all of the trip in 1926; he thinks that she could have paid all of his expenses for \$30.00 a week; they lived both in hotels and camped out.

There was no further testimony offered on behalf of either party and the foregoing is a correct statement of all the testimony offered and received in the above entitled cause.

CLARENCE N. GOODWIN,
Attorney for Petitioner.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Approved:

_____,
Member of the United States
Board of Tax Appeals.

Approved and Ordered Filed this 20th day of January,
1932.

STEPHEN McMAHON,
Member.

59 United States Board of Tax Appeals. Filed Dec. 11,
1931.

In the Court of Appeals of the District of Columbia.

B. T. A. No. 46036.

HUGENIA S. DOGETT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty (60) days from the date of the filing of the petition for review and notice thereof in the above entitled case transmit to the Clerk of the Court of Appeals of the District of Columbia certified copies of the following documents and entries:

1. The docket entries of proceedings before the United States Board of Tax Appeals.
2. The petition filed by the taxpayer.
3. The answer of the Commissioner.
4. Findings of fact, opinion and decision of the United States Board of Tax Appeals, including the final order of redetermination.
5. Agreed statement of the evidence.
6. Petition for review and assignments of error.
7. Notice of filing of petition for review and admission of service.
8. Stipulation under paragraph (d) of Section 1002 of the Revenue Act of 1926 that the case shall be reviewed by the Court of Appeals of the District of Columbia.
9. This *Præcipe*.

CLARENCE N. GOODWIN,
Attorney for Petitioner,
7 South Dearborn Street,
Chicago, Illinois.

Service of a copy of the foregoing *præcipe* is hereby acknowledged this 11th day of December, 1931.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
C.

HUGENIA S. DOGGETT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 59, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25 day of January, A. D. 1932.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk.

Endorsed on cover: Board of Tax Appeals. No. 5603. Hugenia S. Doggett, appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Feb. 4, 1932. Henry W. Hodges, Clerk.

SEP 30 1932

Henry M. Rodger

No. 5603

CLERK

**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1932

HUGENIA S. DOGETT, APPELLANT

v.

**DAVID BURNET, COMMISSIONER OF INTERNAL REVE-
NUE, APPELLEE**

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

G. A. YOUNGQUIST,
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**SEWALL KEY,
JOHN G. REMEY,**

Special Assistants to the Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

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*Special Attorney, Bureau of Internal Revenue,
Of Counsel.*

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In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5603

— HUGENIA S. DOGETT, APPELLANT

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
appellee

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF FOR APPELLEE

PREVIOUS OPINION

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 17-19), reported in 23 B. T. A. 744.

JURISDICTION

This proceeding involves Federal income taxes for the year 1926, and is before this Court on petition to review the decision (order of redetermination) of the United States Board of Tax Appeals entered June 19, 1931. (R. 19-20.) The petition for review was filed herein December 11, 1931 (R. 21), by agreement between the Commissioner of

Internal Revenue and the taxpayer (R. 20), and pursuant to the provisions of Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

QUESTION PRESENTED

Whether appellant's activities in the year 1926 in connection with the writings of Joanna Southcott, constituted a trade or business. The answer to this question will determine whether certain expenses incurred in connection with such activities are deductible from appellant's gross income.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 26:

SEC. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuits of a trade or business; * * *

STATEMENT OF FACTS

The Board of Tax Appeals made detailed findings of facts as follows (R. 15-17):

The appellant is a resident of San Diego, California. After 1911 she went to England and worked under the Bishop of England, doing social-

service work. While in England she became conversant with the writings and teachings of one Joanna Southcott, who died in 1814. She read the 65 works of Joanna Southcott which were in the British library. The remaining works of Joanna Southcott were supposed by her followers to be sealed in an ark in the custody of the British Parliament. These writings were to be opened in 1914, 100 years after the death of Joanna Southcott, or whenever the nation's troubles demanded that they be opened. As a matter of fact, they have never been opened.

In 1917 the appellant went to San Diego and began to publish the works of Joanna Southcott. She believed that it was her duty to print these books for the benefit of the American people. She did not expect to make a great amount of profit until the ark was opened, at which time she expected a great demand for works. She employed others to do her printing.

The appellant, from 1917 to the present time and particularly during the year 1926, has devoted practically all of her time to the work of the printing of the Joanna Southcott writings and the advertising of such printed books. She advertised in newspapers and magazines and carried banners on the rear and sides of her automobile. Altogether she has expended approximately \$38,000 on printing, advertising, and incidentals. There have not been many sales of the books and about 200,000 are

stored in San Diego. The selling price of the books was from 100 per cent to 200 per cent more than the cost, exclusive of selling expense.

The existing works of Joanna Southcott have been translated into Spanish, French, and Hungarian and are read by her followers in the United States, England, Australia, and New Zealand. There are about 50,000 of her followers in the United States.

When the appellant first started printing these books she had very little income from any source whatever. However, in 1923 certain real estate in Chicago which she had inherited from her husband was sold and the proceeds of that have brought her in considerable income ever since. This is her only source of income except from the sales of books. The income received from the sale of books from the years 1917 to 1926 was in an inconsiderable amount. The largest amount received from the sales of these books was \$226.88 in 1924. In 1926 the amount received from the sales was \$46.75. The appellant did not include this amount in her income-tax return for 1926.

The appellant left samples of books at a number of book stores, including Marshall Fields in Chicago, so that orders could be taken, but kept no supply of the books on hand at any of these places.

The appellant's assistant in this work was Percy Granger Smith. He looked after the printing of the books, helped the appellant with the proof read-

ing and with the advertising. He attended to the packing and also made speeches at different times in connection with the propagation of these works. During the year 1926 Smith devoted all his time assisting the appellant in the dissemination of the handbills and the advertising of these publications. The appellant did not pay him a salary, but she furnished him room and board free and also furnished him money for his clothing and for incidental expenses.

The appellant had hand bills printed, advertising the works of Joanna Southcott. She distributed these hand bills free of charge to different places. In 1926 the appellant and Smith spent almost the entire year traveling in an automobile, distributing these hand bills and advertising these publications. They distributed during that year approximately 150,000 hand bills. Smith drove the car. They kept no account of the expenses of this trip, but the appellant paid all of the expenses. They attended an Episcopal convention in New Orleans with the hope of getting the bishops attending it interested in the opening of the Ark. In all of their travels in 1926 they covered approximately 23,000 miles. They stopped at villages all along the road, left pamphlets at the libraries, camp grounds, boarding houses, and hotels, and sometimes made speeches.

The automobile in which the appellant and Smith made the trip was purchased by the appellant in December, 1925, for \$2,800. She used it for about

two years, at the end of which time it had but little value.

In 1926, the appellant expended \$222 for printing hand bills. She did not expend anything in that year for printing any of the works of Joanna Southcott.

The Board held that the appellant was not engaged in a business and that she is not entitled to any of the claimed deductions. The appellant seeks a review of this decision.

The deductions now claimed as business expenses are \$1,500, salary to Smith; \$2,760, expenses in operating automobile; \$1,400, depreciation on automobile; and \$222, printing hand bills; total, \$5,882. (Br. 24.)

SUMMARY OF ARGUMENT

To constitute a business the activities entered into must be for the purpose of livelihood or profit. No such purpose is disclosed by the evidence. It does disclose that appellant's purpose was to enter the publishing business for profit only after the English Government could be prevailed upon to open the sealed writings. This contingency was beyond the control of the appellant and beyond any reasonable probability of fulfilment so far as the record discloses. Prior to that event no profit was or could be expected from the venture. Hence, the expenses connected with the advertisement of the books, like the cost of printing them, are outlays in the nature of capital expenditures.

ARGUMENT

Appellant's activities during 1926 were not such as to bring them within the accepted definition of the word "business"

The appellant contends that the expenditures claimed as deductions were made in connection with the carrying on of a business. The appellee's position is that the activities of the appellant did not constitute a business within the accepted definition of that term.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the Supreme Court, after stating that the word "business" is a very comprehensive term and embraces everything about which a person can be employed, defined the term as follows (p. 171):

That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.

This broad language was restricted somewhat in *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 516, where the Court said:

* * * that the decision in each instance must depend upon the particular facts before the court.

The facts here are not in dispute. They disclose that appellant's time, attention, and labor were devoted in 1926 to creating an interest in and a demand for the books of Joanna Southcott. None of these books was printed in 1926. (R. 31.) She traveled over the country in an automobile with an

assistant distributing hand bills and doing other propaganda work. She, in effect, was engaged in an advertising campaign. Expenses connected with such activities are deductible ordinarily when it is shown that they were incurred in carrying on a business. It is submitted that the expenses here claimed are not deductible for the reason that the activities of the appellant did not constitute a business in that they were not entered into for profit.

The agreed statement of the evidence supports the conclusion that the activities of the appellant during the period from 1917, when the first printing of the books was undertaken, through the year 1926, were entered into with no expectation of profit until the happening of an improbable event at some unascertainable time in the future. The appellant testified (R. 32):

She has nearly 200,000 of these books now stored away and she thinks there will be a call for them for the reason that those records that are not open and are in the box might be opened by the Government; * * * without these writings they wouldn't understand the box. They must have these writings as a key as to what the box contains; * * * she believes that the people will demand it because it says in one of the books that there will not be enough literature to furnish the demands of the public when the box is opened and that is her reason for storing these up until that time.

Upon cross-examination, she said:

* * * the opening of the Ark is dependent upon the action of Parliament and the House of Lords; possibly they can open it or refuse to open it as long as they please; * * * her idea is to create a demand for these books and when the box is opened the demand will be so great that she will not be able to furnish them. * * * she believes that the Ark will be opened in time for her to make a business out of it. (R. 35.)
When the nation's troubles demand it, the manuscripts left with Parliament will be opened; * * *. (R. 36.)

The witness, Smith, repeatedly testified that profits from the sale of the books could be expected only through the opening of the box of sealed writings. (R. 40-41.)

This testimony clearly indicates that the appellant was at no time during the period from 1917 through 1926 and up to 1930, the date of the hearing before the Board, engaged in activities entered into for profit. Such activities were rather in the nature of preparations to enter the publishing business upon the happening of a highly improbable event. In this view of the case the cost of printing the books and the expense of advertising them must together be considered outlays in the nature of capital investment.

An occupation or employment will not be excluded from the classification of business merely because it actually results in loss instead of profit.

Deering v. Blair, 23 F. (2d) 975 (App. D. C.). But the same case holds that it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued in order to bring it within the accepted definition of the word. In the instant case the facts disclosed neither purpose, and for that reason the analogy attempted to be drawn by the appellant (Br. 19) between this case and business enterprises suffering losses in their initial steps of operation is without merit.

Appellant urges that the actual intent of a person in entering upon a venture is determinative as to whether the venture constitutes a business or not. As a general proposition this statement is correct, but the difficulty here is that the preponderance of the evidence discloses that the venture was entered into with no expectation of profit until the opening of the Ark, a highly improbable event which could not be reasonably foreseen. The intention was to secure a profit on the happening of that vague and remote contingency and not before. She never reported any income from the sale of books because the sales were less than \$150 a year. In 1926 they amounted to \$46.75 (R. 34); in 1929, \$150 (R. 33). Without appellant's income from other sources the venture could not have been continued. The inevitable conclusion to be drawn from these facts is that the venture in 1926 was not one entered into for profit.

The appellant cites *Plant v. Walsh*, 280 Fed. 722 (Conn.); *Wilson v. Eisner*, 282 Fed. 38 (C. C. A. 2d); *Commissioner v. Widener*, 33 F. (2d) 833 (C. C. A. 3d). But, as the Board points out, these cases are not in point for in each case the venture was of a nature which could be reasonably expected to produce a profit at any time. In the *Widener case*, for example, which involved expenses incurred in breeding, buying, and selling horses and entering them in racing contests for gain, the court allowed the deductions claimed as business expenses and adopted the Board's language in which it was said:

The winning of a single race or the chance purchase of a yearling might at any time convert steady losses into a net profit, and make it a successful business.

Here the hope or expectation of a profit depended upon the opening of the sealed writings, an event wholly beyond the control of the appellant and, so far as the record discloses, beyond the realm of reasonable probability. The appellant's sincere belief that the opening of the box was imminent was of no avail in view of the total absence of any evidence which reasonably and fairly supports such belief.

CONCLUSION

It is submitted that the Board's decision was correct and should be affirmed.

Respectfully,

G. A. YOUNGQUIST,
Assistant Attorney General.

SEWALL KEY,

JOHN G. REMEY,

Special Assistants to the Attorney General.

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Bureau of Internal Revenue,

Of Counsel.

SEPTEMBER, 1932.

DEC 28 1932

No. 5603 *Henry W. Hodges*

CLERK

IN THE

Court of Appeals of the District of Columbia

October Term, 1932.

HUGENIA S. DOGETT,

Appellant,

v.

DAVID BURNET, Commissioner of Internal Revenue,
Appellee.

APPELLANT'S REPLY BRIEF.

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IN THE

Court of Appeals of the District of Columbia

October Term, 1932.

HUGENIA S. DOGGETT,

Appellant,

v.

DAVID BURNET, Commissioner of Internal Revenue,
Appellee.

APPELLANT'S REPLY BRIEF.

—

Appellee, in his brief, has changed his position and departed from the ground upon which the Board of Tax Appeals decided this case in his favor. The Board of Tax Appeals held that appellant was, in good faith, engaged in the publication and sale of the works of Joanna Southcott for profit but that, nevertheless, her activities did not constitute a "business" because they held

"that in order for an occupation to constitute a 'business' within the meaning of the definition given by the Supreme Court, it must not only be entered into for profit, but that there must be a reasonable expectation of making a profit within a reasonable time" (R. 19).

Appellee now concedes that appellant is correct in her contention that the actual intent of a person in entering upon a venture is determinative as to whether the venture constitutes a business or not (Br. 10). Appellee states at the place cited that as a general proposition appellant's contention is correct, but that the preponderance of the evidence in this case shows that "the venture was entered into with no expectation of profit until the opening of the Ark, a highly improbable event which could not be reasonably foreseen," and that appellant's intention was "to secure a profit on the happening of that vague and remote contingency and not before." The Board of Tax Appeals found as a fact that appellant intended to make the publication of these works her business and expected to derive a profit therefrom but held that despite this fact, her activities did not constitute a business because, in the opinion of the Board, there was no reasonable expectation of making a profit within a reasonable time. The finding of fact that appellant was engaged in this venture for profit, appears in the opinion of the Board at page 19 of the Record, as follows:

"We have not overlooked the testimony of petitioner and her assistant, which is not disputed, to the effect that she intended to make the publication of these books her business and expected to derive a profit therefrom."

The fact that this finding of fact appears in the opinion instead of in the division of the Board's decision under the heading "Findings of Fact" is immaterial. *Insurance & Title Guarantee Co. v. Commissioner of Internal Revenue* (C. C. A. 2d), 36 F. (2d) 842, certiorari denied, 50 S. Ct. 352.

In *Rosenberg v. Commissioner of Internal Revenue*, 59 App. D. C. 178, 37 F. (2d) 808, at page 810, this Court held that:

“It is the settled rule of this court that the Board’s findings of fact should be accepted as final, if sustained by substantial evidence. *W. K. Henderson Iron Works & Supply Co. v. Blair*, 58 App. D. C. 114, 25 F. (2d) 538.”

In *Phillips v. Commissioner*, 283 U. S. 589, at pages 599-600, the Supreme Court held that the Board’s findings of fact are final if there is any evidence to support them. To the same effect see *Avery v. Commissioner*, (C. C. A. 5th), 22 F. (2d) 6; *F. G. Inc. v. Commissioner of Internal Revenue*, (C. C. A. 7th), 47 F. (2d) 541; *Refing v. Burnet*, (C. C. A. 8th), 47 F. (2d) 859, at 860, and cases there cited.

Appellant contends that not only was there substantial evidence to support the Board’s finding that appellant was engaged in this business for profit, but that all the evidence was to that effect and that there was no countervailing evidence of any kind.

Appellant, Mrs. Doggett, testified that “the publication of the books has taken all of her time since she started in 1917; she did not give any time to social matters; * * *” (R. 31).

At page 30, her testimony appears that

“she owns certain property in Chicago, which is the proceeds of the sale of certain real estate in Chicago that was devised to her by her husband. That real estate was sold in 1923 and the income which she derives now is from the investments made from the proceeds of that sale and is her sole income outside of what she may have received in the matter of these publications. Until that property was sold in 1923, expenses in connection with the property in Chicago were in excess of her income so that there was no money received prior to that time.”

At page 31:

“When she returned to America her idea was solely to make the reprinting and distribution of the books of Joanna Southcott her business; she stated so to everybody; she thought that it was her duty to come back home to her country and print these books for the benefit of the American people; she expected to make a profit out of it for herself because it was a business and she felt that she was well adapted to that kind of business. When she first started in this business she went in in a small way and later, when she sold her property, she put in more money; she really and truly expected that the publication of this literature would yield her financial advantage and she still thinks so; she thinks that it is a venture which she has to finance.”

At page 32:

“* * * It is her honest conviction that she is going to get that money back and also to get a percentage on what she has invested. She has made every possible effort to sell these books by advertising in the newspapers and magazines, and has carried banners on her car.”

At page 33:

“* * * Her purpose is to develop a demand for these books she is having printed * * *.”

At page 34:

“besides advertisements in the public press and leaflets, she had agencies for the sale of these publications in Hollywood, Texarkana, Des Moines, San Diego, Marshall Field's in Chicago, and other places mostly in the middle west and central states. Her idea in putting in agencies was to make a demand for the books and put them where they would be observed. She left a copy of each book and gave them handbills so that books might be ordered from the handbills and the sample copies.”

At page 37:

“* * * She told him what she had been doing; he knew that she was in the business of selling books * * *”

The witness Smith, whose testimony appears at pages 38 to 42 of the Record, testified that

“since 1916 his occupation has been a salesman in books and working with the publications of Joanna Southcott * * * his time from 1916 up to the present time has been taken up most entirely on this work” (R. 38).

At page 40, he testified that:

“* * * She did not expect to give away the books but to sell them at the stated prices mentioned on the advertising sheets; the prices stated are from one hundred to two hundred per cent more than the cost of the books; the sale price exceeds the cost by two hundred per cent. She made a profit on the sale of the books that large exclusive of the selling expense. All of the books listed there, if they are sold at the prices that are named, would yield Mrs. Doggett a profit, provided the selling expense did not wipe it out; the discrepancy between the cost and selling price covers the overhead in selling; these things were considered by him and Mrs. Doggett and were discussed between them. In 1926 Mrs. Doggett's expectation undoubtedly was that the selling of these books would yield her a profit; she expected to sell at a profit.”

At page 41:

“There is a great interest in the publication—; he means interest in the truth of the woman Joanna Southcott, and her publications; quite a number are interested enough to buy books; 50,000 people all over the United States are interested in this work; the demand will be greatest when the crisis occurs that Mrs. Doggett is speaking about; he does not expect to get any *large* profit out of

the business up to the time that it occurs. (Italics supplied.) * * * It is not exactly true that he and Mrs. Doggett are more interested in taking people away from their troubles than in any money they are going to make out of it; the primary consideration is making a profit out of the books; he believes that the crisis when the box will be opened will occur in the near future; he believes that the time is close at hand. He is not primarily interested in the opening of the box, but in the dissemination of these writings outside of the box because of the profits that are attached to them and because every time you sell a book you make a profit * * *."

In the testimony of appellant, Mrs. Doggett, quoted by appellee in his brief, at page 8, she testified that for the last four or five years it has been her expectation that in the next year the box might be opened. This testimony was omitted from the quotation in appellee's brief and this omission would leave the Court with the impression that appellant had no expectation that the box would be opened within any definite period of time. The entire sentence quoted from by appellee is as follows:

"They must have these writings as a key as to what the box contains; she has felt for the last four or five years that in the next year the box might be opened; she believes that the people will demand it because it says in one of the books that there will not be enough literature to furnish the demands of the public when the box is opened and that is her reason for storing these up until that time."

There is not one word in the evidence to show that appellant did not sincerely and in good faith enter into the publication and sale of these books for the purpose

of making a profit thereon and that she sincerely believed every year that the time was immediately at hand when the business would begin to pay her large profits. The evidence shows that appellant entered into this business in 1917 when she had little or no income; that she invested what slender means she had and made every effort to sell the books for the purpose of making a profit thereon, and always in the expectation that profit would result. In view of appellant's testimony that she has given her time exclusively to the publication and sale of these books since 1917, that she did not give any time to social matters, and that she has made every possible effort to sell these books, it is idle for appellee to say that she was engaged merely in "preparation to enter the publishing business upon the happening of a highly improbable event" (Br. 9), and that for that reason the legitimate expenses of her business must be considered outlays in the nature of capital investment. The finding of the Board of Tax Appeals that appellant *was* engaged in this business for profit, supported as it is by all the testimony in the case, precludes the argument which appellee attempts to make, as the Board's finding is conclusive and appellee's argument has no foundation or support in the facts of the case.

Appellee states on page 10 of his brief that appellant never reported any income from the sale of books because the sales were less than \$150 a year. Her testimony, however, was that she never reported the income from the sale of books because

"they were less than \$150 a year; there is no income from the sale after deducting the postage" (R. 34). "* * * According to the record book, she sold in that year (1926) \$46.75; she did not report

that \$46.75 on her income tax return because it was such a small amount she had paid that in postage and incidentals * * * in 1920 at the Hollywood Book Store, she sold \$150 worth; she thinks that as large as any year; she did not report that as income because she had no income at that time" (R. 34-35). (See also R. 37 and 39.)

Appellee attempts to distinguish the cases cited by appellant by saying that in each case the venture was of a nature which could be reasonably expected to produce a profit at any time. Appellant has pointed out that every case decided by any Court and the cases in the Board of Tax Appeals itself, with the exception of this case, have held that the sole test of whether a venture constitutes a business within the meaning of the Revenue Acts is whether it is entered into and carried on in good faith for the purpose of making a profit thereon or whether it is conducted for pleasure, exhibition or social diversion. The question of reasonableness of the taxpayer's belief that a profit would be realized has nothing to do with his right to engage in business and deduct from his gross income, the legitimate business expenses authorized by law.

It may be pointed out that while appellee says that appellant's expectation of profit depended upon an event wholly beyond her control and so far as the record discloses, beyond the realm of reasonable possibility, it is as reasonable to suppose that the English government will carry out the trust imposed upon it by Joanna Southcott when she deposited these writings with it, and which trust was accepted by it, as it is to suppose that a taxpayer's horse will win a horse race and make his business successful. If one were searching for an event beyond the taxpayer's control, no bet-

ter example could be cited than the winning of a horse race which would net enough to convert steady losses into a net profit.

Since the brief was filed in the present case, the Board of Tax Appeals has decided the case of *Marshall Field v. Commissioner*, 26 B. T. A. 116, in which the opinion was by Board Member Smith, and apparently was concurred in by the member who wrote the opinion in the present case. The Board there said:

“The losses are deductible, provided Caumsett Farm was operated as a trade or business for profit. *Plant v. Walsh*, 280 Fed. 722; *Thatcher, et al. v. Lowe*, 288 Fed. 994, A. F. T. R. 1931; *Deering v. Blair*, 23 Fed. (2d) 975, A. F. T. R. 7253. The petitioner contends that the Caumsett Farm was operated for profit within the meaning of the taxing statute and the mere fact that it was operated at large losses in 1923, and subsequent years, does not change the character of the enterprise as a business for profit. In support of his contention the petitioner cites numerous decisions of the Board and of the courts in which losses sustained on farm operations have been held legal deductions from gross income. (Citing cases.)

“We have carefully examined the above-referred to cases and others in which the Board has allowed the deduction from gross income of losses sustained in the operation of farms. From a consideration of all of them we reach the conclusion that the intention of the taxpayer with respect to the operation of the farm is material. Cf. *Plant v. Walsh*, *supra*; *Thatcher, et al. v. Lowe*, *supra*; *Deering v. Blair*, *supra*. If the taxpayer operates a farm with the intention of making a profit and not merely ‘as a place of pleasure, exhibition, and social diversion’ (*Deering v. Blair*, *supra*), the fact that losses may be sustained from the operation of the farm does not change the character of the enterprise from

one operated for profit to one not operated for profit.

“The testimony of the petitioner in the proceeding at bar is most emphatic that Caumsett Farm was operated for profit. * * * There is no evidence that Caumsett Farm was operated as a place of pleasure, or for social diversion. In the circumstances it must be held that Caumsett Farm was operated for profit, within the meaning of the statute, and that the petitioner’s losses sustained from the operation of the farm in 1923 are legal deductions from gross income.” (Italics supplied.)

In *General Counsel’s Memorandum 10873, Cumulative Bulletin IX—37-5675 (page 2), (1932 C. C. H. Federal Tax Service, Vol. III, Par. 6360, page 6253)*, the taxpayer believed that she had devised a system of gambling to “beat” the French gambling casinos and believed that she was conducting her gambling transactions in such a way that they would ultimately result in a profit to her. The General Counsel, in ruling that as the taxpayer’s gambling transactions were entered into for profit, her losses should be allowed as deductions, said:

“The record shows that the taxpayer was the recipient of a very large annual income derived principally from trusts, that she lived abroad, that her losses were not excessive in proportion to her income, that her gambling was not done as a means of livelihood, that such gambling was prohibited in France except in a few watering resorts for the rich, that she traveled a great deal, and had interests in other parts of the world, from all of which it might be argued that the taxpayer’s gambling was done for sport and amusement, or for recreation and entertainment, or for the thrill of it, and not for ‘profit’ within the meaning of the statute. It is of course a matter of common knowledge

that the odds are heavily against the participant in such gambling.

The question then occurs whether such facts of record could reasonably be regarded as sufficient to overcome the evidence submitted by the taxpayer. The comments of the Board in the quoted portion of the *Beaumont* case give some color to the answer that they might be so considered, but on the other hand the Board did not have before it evidence of the same weight and sufficiency as has been presented to the Bureau in the instant case. In *Edgar N. Carnick v. Commissioner*, (21 B. T. A. 12), the Board said:

* * * In a case such as this, the taxpayer seeking the deduction must prove in fact that the transaction resulting in the alleged loss was and reasonably might have been entered into for profit. * * *

If 'reasonableness' were the test—that is, if the question were whether the taxpayer 'reasonably' entered into the gambling transactions for profit—there might be good ground for holding that her losses were not deductible; but the statute does not appear to provide such a test, and the Board's use of the word 'reasonably' in the Carnick case is believed to relate to the particular case which the Board had under consideration.

In the *Beaumont* case the Board said that 'the question whether the gambling transactions under consideration were entered into for profit is a question of fact.' Therefore, in order to sustain a disallowance of gambling losses as deductions the Bureau would have to overcome the taxpayer's testimony or other evidence that such transactions were in fact entered into for profit.' (Italics supplied.)

This ruling was handed down in September, 1932, and shows that the Bureau does not regard the reasonableness of the taxpayer's expectation of making a profit

as being material to the question of whether the taxpayer was conducting a business within the meaning of the Revenue Act. This ruling and the opinion of the Board in the *Marshall Field case, supra*, are entirely inconsistent with the position taken by the Board and the Bureau of Internal Revenue in the present case. It is submitted that appellant's contention that she was engaged in a business and is entitled to deduct her legitimate business expenses is fully supported by all the cases and by the ruling of the General Counsel of the Bureau of Internal Revenue cited, that appellee's contention here is contrary to his position in other cases, and has no foundation in law or in fact.

Appellant therefore respectfully submits that the decision of the Board of Tax Appeals should be reversed and remanded with directions to allow appellant additional deductions of \$5,882.00 from her gross income for the year in question and to ~~recompute~~ compute the deficiency in appellant's taxes accordingly.

Respectfully submitted,

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Of Counsel.

